UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Sysco Columbia, LLC	
and	**Case No. 10-CA-197586** **10-CA-197588** **10-CA-203636**
International Brotherhood of Teamsters, Local Union 509	**10-CA-210623**

RESPONDENT'S PARTIAL MOTION TO DISMISS COMPLAINT

COMES NOW, Respondent Sysco Columbia, LLC ("Sysco Columbia") and pursuant to Sec. 102.24 of the NLRB's Rules and Regulations submits the following Partial Motion to Dismiss from the above-captioned unfair labor practice proceedings the allegation that Sysco Columbia violated the Act by showing employees a DVD that "threatened employees that their wages would remain frozen during negotiations if they choose the Union to represent them." (See Amended Complaint) on the grounds that the content of the DVD is not disputed and the content is lawful under the Act. As further grounds for and support of this Motion, Sysco Columbia states:

I. BACKGROUND

On March 15, 2017, in NLRB Case No. 10-RC-194843, Teamsters Local 509 filed a petition for a certification election among drivers employed by Sysco Columbia. The Region ordered a mixed manual and mail ballot election for the drivers. Employees began voting by mail ballot on April 13, 2017. The manual ballots were cast on April 14. On April 26, 2017, just two days before the ballots were to be tallied, two weeks *after* the manual ballots had been cast and after most employees necessarily had already returned their mail ballots, the Teamsters filed an

unfair labor practice charge (Case No. 10-CA-197586) which blocked the ballot count. Since then, Case No. 10-RC-194843 has been open but the results of the election remain unknown because the ballots are impounded.

The Teamsters filed a representation petition covering Sysco Columbia's fleet mechanics on March 29, 2017 (Case No. 10-RC-195759). The election was scheduled on April 27, 2017. However, the Teamsters filed an unfair labor practice charge in that case too, blocking the election (Case No. 10-CA-197588).

On September 29, 2017 the Teamsters filed 10-CA-203636. On November 29, 2017 the Teamsters filed 10-CA-210623. Case Nos. 10-CA-197586, 10-CA-197588, 10-CA-203636, and 10-CA-210623 have been consolidated and are set to be heard on March 12, 2017.

II. MOTION TO DISMISS STANDARD

Pursuant to 29 C.F.R. § 102.35(a)(8), the Administrative Law Judge, between the time of designation on matters and transfer of the case to the Board, can "dispose of procedural requests, or similar matters, including . . . motions for default judgment, summary judgment, or to amend pleadings; also to dismiss complaints or portions thereof." The ALJ Bench Book is explicit that the ALJ should "follow the same standard the Board uses in ruling on motions to dismiss under Section 102.24." See Administrative Law Judge Bench Book, Motions and Special Appeals, 2015 WL 6503842, at *1. In ruling on motions to dismiss under 29 C.F.R. § 102.24, the Board follows the standard used for motions to dismiss filed under Federal Rule of Civil Procedure 12(b)(6). See *Yale University*, 330 NLRB 246, 247 n. 8 (1999) (the Federal Rules of Civil Procedure guide the Board in reviewing a motion to dismiss). Under that standard, the Board "construes the complaint in the light most favorable to the General Counsel, accepts all factual allegations as true, and determines whether the General Counsel can prove any set of facts in support

of his claims that would entitle him to relief." *Detroit Newspapers Agency*, 330 NLRB 524, 525 n. 7 (2000); see also *Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995); see also *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

III. LEGAL ARGUMENT

During the campaign, Sysco Columbia showed a DVD to employees, which is the subject of ULP Charge 10-CA-203636. What was said on the DVD is not at issue because it is recorded. The General Counsel has a copy.

The General Counsel claims Sysco Columbia, by this DVD, illegally "threatened employees that their wages *would remain frozen* during negotiations if they choose the Union to represent them." The DVD actually says, "wages and benefits would still be frozen *at the status quo*" during negotiations, if employees chose the union. This statement is true. It is what the Act would require if the employees chose the union. During bargaining, the NLRA obligates an employer to maintain the status quo.[1] It cannot violate the Act to tell employees you are going to follow the Act.[2]

Sysco Columbia offered to enter into a joint stipulation with the General Counsel whereby the parties would stipulate that the DVD said "wages and benefits would still be frozen at the status quo" so the allegation could be more efficiently resolved as a matter of law. However, the General Counsel refused to stipulate to what the DVD says. Tellingly, the parties were unable to reach a stipulation because the GC refused to include the words "*at the status quo*" – likely be-

[1] See e.g., *NLRB v. Katz*, 369 U.S. 736, 744 (1962)("We hold that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of §8(a)(5)…"); *Crown Elec. Contracting, Inc.*, 338 NLRB 336, n3 (2002)("The Board has held that promises to maintain the status quo are not objectionable."); *Weather Shield Mfg.*, 292 NLRB 1 (1988), rev'd on other grounds 890 F.2d 52 (7th Cir. 1989)("promise to maintain the status quo…neither objectionable nor violative of Section 8(a)(1)"); and *Wilkes-Barre Hosp. Co., LLC*, 362 NLRB No. 148 (2015)("It is well established that an employer violates Section 8(a)(5) and (1) of the Act if it changes the wages, hours, or terms and conditions of employment of represented employees without providing the Union prior notice and an opportunity to bargain over such changes.").

[2] *Crown Elec.* and *Weather Shield*, supra.

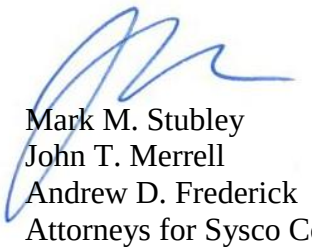
cause the inclusion of those words would make clear that the statement is objectively lawful. Thus, the General Counsel cannot "prove any set of facts in support of his claims that would entitle him to relief." *Detroit Newspapers*, supra.

There is no issue of fact or law here. The GC's refusal to stipulate to what the DVD indisputably says and persistence in maintaining a position contrary to settled labor law is an utter waste of time and money. The elections in this case have been blocked for a year. By maintaining allegations for which no relief can be granted, the GC further delays the employees' statutory right to choose whether they want to be represented.

CONCLUSION

WHEREFORE, Sysco Columbia respectfully requests that the allegations relating to the DVD, *i.e.* paragraph 9 of the Complaint, be dismissed with prejudice.

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Respondent's Motion to Dismiss has been served via email on the following on the date below by Sysco Columbia, LLC:

John D. Doyle, Jr., Regional Director
National Labor Relations Board
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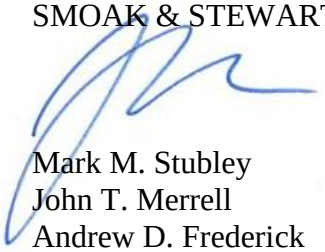
Dated this 11th day of March, 2018.

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.



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